OOI YOKE IN (F) & ANOR.

v.

PUBLIC FINANCE BERHAD

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK JC
[CIVIL APPEAL NO. 12-15-92 (92)]
24 DECEMBER 1992

HIRE PURCHASE: Unpaid rentals - Allegation of breach of s. 4(1) of Hire Purchase Act - Must documents be received by hirer - Frustration of agreement - Absence of fraud and misrepresentation - Does agreement bind the hirer.

The 1st appellant took on hire from the respondent one second hand BMW car. The transaction was the subject of a formal hire purchase agreement dated 10 August 1988. The 2nd appellant was the guarantor. The 1st appellant paid the initial deposit of RM8,000 but refused to pay a single instalment thereafter. During the currency of the agreement the BMW car was seized by the police on 16 November 1988 suspected to be used in a kidnapping case.

The appellants appealed against the decision of the Sessions Court on four grounds, namely:

(i) that the summary of financial obligations (P1) had not been satisfactorily proved in accordance with law.
(ii) admission of hearsay evidence thereby occasioning a serious miscarriage of justice.
(iii) that the hire purchase agreement (P2) was frustrated.
(iv) that the 1st appellant/hirer was not bound by the agreement.

Held:

[1] In the instant appeal there was no concession by the owner in regard to exhibit P1. Again in the instant appeal there was evidence of an admission by the hirer before the learned Magistrate that the BMW caee was still under hire purchase with the respondent. The hirer cannot now be heard to say that there was a breach of s. 4(1) of the Act.

[2] Both PW1 and PW2 being officers of the respondent and having given evidence before the trial Court would certainly have fulfilled the requirement in s. 44 of the Act. Moreover, the word "serve" which appears in s. 44 of the Act does not mean receipt of the document. The respondent need not prove that the hirer received exhibit P3A containing the agreement. All they need do and must do is in prove that the agreement had been served on the hirer.

[3] It was the hirer's husband that used the BMW car to contravene the law, an individual know to the hirer. There was no statutory declaration by the hirer to say that she had no knowledge that the BMW car was missing. When the hirer obtained possession of the BMW car on 6 September 1991 by order of the learned Magistrate, she had custody of the BMW car and consequently could use the BMW car at anytime. Till today the BMW car is still with the hirer. Viewed objectively, the changed circumstances cannot render the agreement impossible of performance. The essence of the agreement remains intact as the changed circumstances was already provided for in the agreement. Legally speaking the agreement is capable of being performed. In consequence the defence of frustration fails.

[4] When a document containing contractual terms is signed, then in the absence of fraud, or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not or whether he knows no English and the contents were not explained to him. In the instant appeal there is no allegation of fraud or misrepresentation and as the hirer has signed the agreement knowing fully well that it was a contract for the purchase a BMW car, the hirer cannot be heard to say that he did not know the terms of the agreement. This principle applied equally to the guarantor.

[Appeal dismissed with costs].

Cases referred to:

Affin Credit (M) Sdn. Bhd. v. Yap Yuen Fui [1984] MLJ 169 FC / [1984] 1 CLJ 149 ***(dist)***

Mohamed Amirdin v. Varatharajan [1968] 2 MLJ 83 ***(refd)***

Malaysia National Insurance Sdn. Bhd. v. Malaysia Rubber Development Corporation [1986] 2 MLJ 124 / [1986] 2 CLJ 285 ***(dist)***

Karpal Singh v. Sultan of Selangor [1988] 1 MLJ 64 / [1987] 2 CLJ 342 ***(dist)***

United Manufacturers Sdn. Bhd. v. Sulaiman bin Ahmad & Anor. [1989] 1 MLJ 482 / [1989] 1 CLJ 1005 ***(refd)***

Ramli bin Zakaria & Ors. v. Government of Malaysia [1982] 2 MLJ 257 [1982] CLJ 158 ***(refd)***

Kin Nam Development Sdn. Bhd. v. Khau Daw Yau [1984] 1 MLJ 256 / [1984] 1 CLJ 347 ***(refd)***
Brisbane City Council v. Group Projects Pty. Ltd. [1979] 54 ALJR 25 ***(refd)***
Chan Buk Kia v. Naga Shipping & Trading Co. Ltd. [1963] MLJ 159 ***(refd)***
Curtis v. Chemical Cleaning & Dyeing Co. Ltd. [1951] 1 All ER 631 ***(refd)***
L'Estrange v. F. Graucob Ltd. [1934] 2 KB 394 ***(refd)***
Ismail bin Savoosah & Ors. v. Hajee Ismail [1889] 4 Ky 543, 458 ***(refd)***
Ka Yin Credit & Leasing Sdn. Bhd. v. Pang Kim Cha & Bros Development Sdn. Bhd. [1989] 2 MLJ 61 / [1989] 2 CLJ 790 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 407
Evidence Act 1950, ss. 66, 73A(1)(2)
Hire Purchase Act 1967 (Revised 1978) (Act 212), ss. 4(1), 5, 43, 44

Other sources referred to:
Chitty on Contracts, 25th Edn, para 1524-1531

For the appellants - Paramjit Singh; M/s. Paramjit & Co.
For the respondent - Yap Wai Kheong; M/s. Choong Yik Son & Fiona Ghaus

JUDGMENT

Hj. Abdul Malik bin Hj. Ishak JC:
This is an appeal by the appellants/defendants against the whole decision of the learned Judge of the Sessions Court, Taiping, Perak ("the trial Court") in respect of unpaid rentals pursuant to a hire-purchase agreement with the respondent/plaintiff. The first appellant ("hirer") took on hire purchase from the respondent ("owner") one second hand BMW car bearing registration number AAQ 8196. The second appellant acted as a guarantor ("guarantor"). The transaction was the subject of a formal hire purchase agreement ("the agreement") dated 10 August 1988. By the agreement the hirer contracted to pay 35 rent instalments of RM486 commencing on 10 September 1988 with a final instalment of RM465. By the agreement the guarantor also guaranteed the payment of the hire purchase rentals and all sums payable under the agreement and to indemnify the respondent against all loss, damage or expense which the respondent may be put to or sustain by reason of the hirer's neglect or breach of the terms or stipulations of the agreement. The hirer paid the initial deposit of RM8,000 but refused to pay a single instalment thereafter. During the currency of the agreement the BMW car was seized by the police on 16 November 1988 suspected to be used in a kidnapping case.

As most of the grounds of appeal are overlapping, Dato' Paramjit Singh, learned Counsel for the appellants relied on four principal grounds only. I shall now deal with them.

The admission of exhibit P1 (summary of financial obligations under the Hire Purchase Agreement) as evidence as it had not been satisfactorily proved in accordance with law

Learned Counsel for the appellants contended that the trial Court failed to take into account that the summary of financial obligations as per exhibit P1 should be given or caused to be given to the hirer. It was submitted that though the hirer's signature appeared on exhibit P1 yet she denied receiving a copy of it. This denial is borne out by the amended statement of defence especially paragraph 3(a) thereof.

In rebuttal, Mr. Yap Wai Kheong, learned Counsel for the respondent submitted that Tee Sew Kee (PW1) under cross-examination categorically stated that exhibit P1 was "handed to hirer". PW1 also stated that he signed exhibit P1.

The rights and duties of parties to hire purchase agreements are clearly spelt out in the Hire Purchase Act 1967 (Revised 1978) (Act 212) ("The Act"). The relevant section is:

> 4(1) Before any hire-purchase agreement is entered into in respect of any goods the owner shall give or cause to be given to the prospective hirer a written statement duly completed in accordance with the form set out in the Second Schedule:
>
> Provided that where the agreement is entered into by way of acceptance by the owner of a written offer signed by or on behalf of the hirer, the provisions of this subsection shall be deemed not to have been complied with unless the written statement was given to the prospective hirer before the written offer was signed.

Mohamed Azmi FJ (as he then was) in *Affin Credit (M) Sdn. Bhd. v. Yap Yuen Fui* [1984] MLJ 169 FC had this to say in regard to s. 4(1) of the Act:

> The words used in s. 4(1) are clear. *Absoluta sententia expositare non indiger*. The words mean what they say, and they plainly require a written statement in the form set out in the

> Second Schedule to be given or caused to be given to the prospective hirer before any hire purchase agreement is entered into. Where the agreement is entered into by way of acceptance by the owner of a written offer signed by the hirer, which is the case in the present dispute, the proviso to s. 4(1) also requires the written statement to be given to the prospective hirer before the written offer was signed.

Further down the page the learned Judge said:

> As a general principle, in order to decide whether the parties have reached an agreement, it is usual to enquire whether there has been a definite offer by one party and an acceptance of that offer by the other.

Again on the same page the learned Judge said:

> Section 4(1) contains a positive and mandatory obligation on the part of the owner to give a written statement to the prospective hirer before an offer to enter into a hire-purchase agreement can be accepted and thereby brings about the formation of an agreement. This is the plain meaning of such words as "Before any hire purchase agreement is entered into" and "unless written statement was given to the prospective hirer" used in s. 4(1).

Now, according to Tee Sew Kee (PW1) the respondent's branch assistant manager, exhibit (P1) was signed by him. PW1 stated that the hirer came to the office and was interviewed by Chung Chew Song (PW2). The hirer signed the exhibit P1 in chinese at the instance of PW2. When PW1 signed P1, the hirer was not present. PW1 further stated that he was aware of the mandatory statutory requirement of the Act and the need to have the contents of exhibit P1 properly translated. PW1 stated further that exhibit P1 was dated on 10 August 1988, the same date wherein the hirer received it. The evidence of PW1 was corroborated by PW2. PW2 stated that the hirer came to the office for a loan. PW2 processed the loan by filling the particulars in exhibit P1. PW2 agreed under cross-examination that exhibit P1, was an important document in the context of s. 4 of the Act. PW2 stated that he handed exhibit P1 personally to the hirer.

It was in evidence that on 6 September 1991 before the learned Magistrate, Magistrate's Court, Taiping the BMW car was released to the hirer under bond pursuant to s. 407 Criminal Procedure Code notwithstanding the presence of learned Counsel for the respondent who unsuccessfully applied for the release of the BMW car to them. The hirer said this to the learned Magistrate to support her application:

> Saya minta kereta BMW AAQ 8196 itu dikembalikan kepada saya. Saya adalah tuanpunya kereta itu. Grant kereta itu ada pada Public Finance sebab masih ada bawah sewa beli. (see exhibit P18 tendered through PW4).

It must be noted that the learned Magistrate released the BMW car to the hirer as her name appeared on the RIMV card pending the trial of Khor Boon Tong (the husband of the hirer) under the Kidnapping Act and the Penal Code.

The hirer stated in no uncertain terms that the BMW car was still under hire purchase with the respondent before the learned Magistrate. She would not have stated this unless she had received exhibit P1.

Before the trial Court, the hirer (DW1) recounted the events that led her to the respondent's office. The hirer stated that she went to the respondent's office on 10 August 1988 to raise a loan. She wanted to purchase her husband's car, a BMW. She admitted signing exhibit P1 but denied being given a copy of exhibit P1. She also denied that the contents of exhibit P1 were explained to her. She further stated that she could not read or write English and that when she signed exhibit P1 the guarantor was also present. The guarantor (DW2) substantially corroborated the hirer.

The trial Court considered rightly (though briefly) that since the hirer had admitted signing exhibit P1, therefore the contention of the learned Counsel for the appellants that exhibit P1 had not been served on the hirer, had no merit whatsoever.

I must at once stress that *Affin Credit (M) Sdn. Bhd's* case can be distinguished from the instant appeal. There the plaintiff as the owner conceded that it had not given the written statement to the defendant as prospective hirer before the written offer was signed on 14 August 1980. In the instant appeal there was no concession by the owner in regard to exhibit P1. Again in the instant appeal there was evidence of an admission by the hirer before the learned Magistrate that the BMW car was still under hire purchase with the respondent. The hirer cannot now be heard to say that there was a breach of s. 4(1) of the Act.

I have anxiously scrutinised the evidence especially the denial by the hirer that she did not receive exhibit P1 as against the testimonies of PW1, PW2 and exhibit P18 and I am constrained to say that I agree with the trial Court that the hirer had infact received exhibit P1. The offer and acceptance as envisaged under s. 4(1) of the Act had been fulfilled. The trial Court rightly applied the facts of the case to s. 4(1) of the Act. She had the advantage of listening to the witnesses and assessing their credibilities. (see *Mohamed Amirdin v. Varatharajan* [1968] 2 MLJ 83). I see no reason to differ from her view.

The admission of hearsay evidence thereby occassioning a serious miscarriage of justice

It was contended by learned Counsel for the appellants that exhibits P3A (the letter dated 10.8.88 from the Respondent) P3B (the registered receipt from the Jabatan Perkhidmatan Pos, Malaysia) and P3C (kiriman banyak barang-barang berdaftar with the respondent's company's name embossed therein) were inadmissible being hearsay. In rebuttal learned Counsel for the respondent argued that the evidence in relation to exhibits P3A, P3B and P3C came from (PW1) an officer of the respondent's company of 20 years standing who naturally would be competent to give evidence pertaining to the records in the respondent's company, such evidence would therefore be admissible.

It is trite law, so submitted learned Counsel for the appellants, that inadmissible evidence does not become admissible by reason of a failure to object (see *Malaysia National Insurance Sdn. Bhd. v. Malaysia Rubber Development Corporation* [1986] 2 MLJ 124 and *Karpal Singh v. Sultan of Selangor* [1988] 1 MLJ 64). I wholeheartedly agree with this proposition of law.

Section 73A of the Evidence Act provides that the maker of the document must be called as a witness in order to render that document admissible in evidence. Section 73A(2) of the Evidence Act further provides that the Court may dispense with that condition in civil proceedings "...if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence..." It was contended by learned Counsel for the appellants that the despatch clerk of the respondent should have been called to give evidence that P3A had been sent by post. However, the need to call the despatch clerk must be viewed in the light of s. 44 of the Act which provides, *inter alia* that oral evidence of the owner's servant or agent as to the posting of any document required to be served is admissible as *prima facie* proof of service. Both PW1 and PW2 being officers of the respondent and having given evidence before the trial Court would certainly have fulfilled the requirements in s. 44 of the Act. Moreover, the word "serve" which appears in s. 44 of the Act does not mean receipt of the document. The respondent need not prove that the hirer received exhibit P3A containing the agreement. All they need do and must do is to prove that the agreement had been served on the hirer. And by virtue of s. 43 of the Act any notice or document required or authorised to be served on or given or sent to a hirer under the Act may be served or given or sent by delivering it to him personally; by leaving it at his place of abode or business with some other person apparently an inmate thereof or employed thereat and apparently of or over the age of 16 years; or by posting it by registered post addressed to him at his last known place of abode or business. The same argument would apply in regard to s. 5 of the Act (see *United Manufacturers Sdn. Bhd. v. Sulaiman bin Ahmad & Anor.* [1989] 1 MLJ 482). With respect therefore *Malaysia National Insurance Sdn. Bhd. v. Malaysia Rubber Development Corporation* (*supra*) and *Karpal Singh v. Sultan of Selangor* (*supra*) can easily be distinguished from the instant appeal as s. 43 and 44 of the Act did not apply to those cases. Thus, the trial Court was perfectly right in admitting exhibits P3A, P3B and P3C.

Learned Counsel for the appellant further contended that ID8A (a notice of intention to repossess dated 12 October 1988) was wrongly re-marked by the trial Court as P8A. It is clear that PW3 was the maker of exhibit P8A and though it was only a carbon copy and no notice to produce the original as required by s. 66 of the Evidence Act was given, yet by virtue of paragraph (a) of the proviso to s. 66 of the Evidence Act it is admissible. Again the remarking of exhibit ID9 as P9 by the trial Court was perfectly in order as the maker was PW3 and it being a notice, it was also admissible under s. 66 of the Evidence Act. The objection

on this score therefore fails.

However, the trial Court rightly rejected ID8B (A.R. acknowledgement slip) as the proviso to s. 73A of the Evidence Act cannot be invoked. Likewise the trial Court was also right in rejecting ID14A and ID14R (the letters of demand,) as the makers were not called.

The trial Court erred in law when she failed to hold that the agreement (exhibit P2) was frustrated

The agreement was entered into between the parties on 10 August 1988. According to ASP Mohd. Yunus bin Ali Bashah (PW4) the BMW car was seized on 16 November 1988 at about 3.00 am from Khor Boon Tong (the hirer's husband) at No. 37, Batu 6, Jalan Sg. Seluang. Lunas, Kulim. The BMW car was in police custody from that date (16 November 1988) till 6 September 1991 when the learned Magistrate released it to the hirer (see exhibit P18) on the following condition:

> **Mahkamah**:
> Kereta exhibit P22 dan P40C (kunci kereta) kepada tuanpunya Puan Ooi Yoke In di bawah s. 407 Kanun Acara Jenayah. Puan Ooi diberi amaran tidak boleh ubah apa-apa atau tukar milik dan sebagainya seperti syarat-syarat terkandung dalam bond s. 407 Kanun Acara Jenayah dengan seorang penjamin dengan jaminan RM10,000.

It was contended by learned Counsel for the appellants that the agreement was frustrated on 16 November 1988 when the police seized the BMW car.

There are quite a number of authorities on the doctrine of frustration but for this exercise I need only quote the following pertinent authorities.

In *Ramli bin Zakaria & Ors. v. Government of Malaysia* [1982] 2 MLJ 257, his Lordship Abdul Hamid F.J. (as he then was) had this to say on frustration:

> ln short it would appear that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

And later further down the page, his Lordship Abdul Hamid FJ (as he then was) said:

> The test is an objective one to determine whether there has been a radical change in the actual effect of the promises of the parties construed in the light of the new circumstances.

In *Kin Nam Development Sdn. Bhd. v. Khau Daw Yau* [1984] 1 MLJ 256, his Lordship Salleh Abas CJ Malaya (as he then was) had this to say in regard to the doctrine of frustration:

> The doctrine of frustration which operates to terminate a contract is of recent origin. (see *Taylor v. Caldwell*). It occurs in a situation where due to a change of circumstances a contract is rendered legally and physically impossible of performance. The doctrine is an exception to the general rule as to an absolute contract in that a person who specifically undertakes an absolute obligation cannot afterwards claim to be absolved from liability by the fact that his failure to perform the obligation is due to the occurrence of an event over which he has no control. The doctrine does not apply just because the promisor's obligation has become, because of change of circumstances, more onerous than what he was contracted for.

From the above mentioned cases the following principle can be distilled, that is, the doctrine of frustration is to be confined to very narrow circumstances, the reason being, I think, that commercial bargains should not be lightly avoided or brushed aside merely upon a change of circumstances. (see *Brisbane City Council v. Group Projects Pty. Ltd.* [1979] 54 ALJR 25 and Chitty on Contracts, General Principles, 25th edition paragraphs 1524-1531).

It would not be wrong to say that to determine the effect of frustration, regard must be had to the intention of the parties as construed from the terms of the agreement (see *Chan Buk Kia v. Naga Shipping & Trading Co. Ltd.* [1963] MLJ 159). Thus, it would be prudent at this juncture to examine the agreement itself. Clause 2(ii) of the agreement, *inter alia*, prohibits the hirer from using or permitting to be used the vehicle in contravention of any statute, ordinance, enactment or regulation for the time being in force or in any manner by reason of which the vehicle may become liable to seizure, confiscation or forfeiture or otherwise in any way contrary to law. And by Clause 2 (iii) of the agreement, *inter alia*, the hirer will keep

the owner indemnified against all loss or damage to the vehicle from whatever cause arising. The hirer knew her obligations under the agreement. The seizure of the BMW car by the police was something which was provided for under the agreement. It was the hirer's husband that used the BMW car to contravene the law, an individual known to the hirer. There was no statutory declaration by the hirer to say that she had no knowledge that the BMW car was used for a criminal act. She did not lodge a police report that her BMW car was missing. When the hirer obtained possession of the BMW car on 6 September 1991 by order of the learned Magistrate, she had custody of the BMW car and consequently could use the BMW car at any time. Till today the BMW car is still with the hirer. Viewed objectively, the changed circumstances cannot render the agreement impossible of performance. The essence of the agreement remains intact as the changed circumstances was already provided for in the agreement. Legally speaking the agreement is capable of being performed. For instance on 6 September 1991 after the hirer took possession of the car she made no attempt whatsoever to pay the arrears of instalments etc. something which could be done had she wanted to. In consequence, I hold that the defence of frustration also fails.

Ancillary points raised by the learned Counsel for the appellant

It has been urged before me by learned Counsel for the appellants that the hirer was not bound by the agreement for the following reasons:

(a) the agreement was written in English, a language alien to her. She could not understand English at all.
(b) the contents of the agreement were not translated to the hirer in Hokkien dialect.

Now, from the available evidence the hirer admitted signing the agreement. She said that she was fully aware that the agreement was in respect of finance provided for by the respondent to enable her to purchase her husband's BMW car. She admitted that she took possession of the BMW car. She said that she did not understand English and that the agreement was not translated to her in Hokkien dialect. However, in her testimony she was categorical in admitting that she was aware of the nature of the agreement.

On the other hand the guarantor admitted signing the agreement. Being a retired school teacher he admitted that he understood a little bit of English.

PW2 (Chung Chew Seng), the assistant branch manager attached to the hire purchase department of the respondent company gave a clearer picture to the whole episode surrounding the agreement. PW2 attested the agreement and gave evidence that he witnessed both the hirer and the guarantor signing the agreement on the same day. PW2 was quite explicit when he said that he handed the agreement personally to the hirer and "...explained it to her. She acknowledged receipt by signing it."

The law is quite clear that when a party signs a contract knowing it to be a contract which governs the relations between them, binding them (so to speak), then, to borrow the words of Denning J. in the case of *Curtis v. Chemical Cleaning & Dyeing Co. Ltd.* [1951] 1 All ER 631:

> his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation.

A pertinent point made by Scrutton LJ in *L'Estrange v. F. Graucob Ltd.* [1934] 2 KB 394 needs mention and that is:

> When a document containing contractual terms is signed then, in the absence of fraud or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

In *Ismail bin Savoosah & Ors. v. Hajee Ismail* [1889] 4 Ky 453, 458 Wood Ag. CJ had this to say:

> It was argued that the defendant being ignorant of the English language he is to be excused on that account from the performance of his contract, but it is to my mind clear that in the common principles which govern the law of contract, the person who contracts by a written document, whether or not he understands the language in which it is written, is bound, in the absence of fraud or misrepresentation, by the terms of that contract, as to which proposition no objection was authoritatively sustained.

In short, when a document containing contractual terms is signed, then in the absence of

fraud, or, misrepresentation, the party signing it is bound, and it is wholly immaterial,

(1) whether he has read the document or not
(2) whether he knows no English and the contents were not explained to him.

In the instant appeal there is no allegation of fraud or misrepresentation and as the hirer has signed the agreement knowing fully well that it was a contract for the purchase of a BMW car, the hirer cannot be heard to say that she did not know the terms of the agreement. This principle applies equally to the guarantor. This ground fails.

Next, it was contended by learned Counsel for the appellants that the respondent could not claim damages without repossessing the BMW car. Looking at the statement of claim it is apparent that the respondent's claim is for unpaid rentals and not for damages for any other loss in respect of the BMW car. A duty to mitigate loss of damages will only arise if a claim is made for any other loss other than arrears of unpaid rentals. Such a duty does not arise here as the respondent is merely claiming for unpaid rental. Furthermore there is no statutory duty under the Act for the owner to repossess the BMW car before the owner files an action against the hirer. As such this ground also fails.

Learned Counsel for the appellants submitted further that they were not liable to pay rentals for the BMW car for the duration when the said vehicle was in the custody of the police. However, such a situation is covered by clause 2(iii) of the agreement which provides that the hirer "... will keep the owner indemnified against all loss and damage to the vehicle for whatever cause arising ..." Accordingly, the appellants are liable to pay the unpaid rentals for the BMW car during the period the said vehicle was in the custody of the police (see *Ka Yin Credit & Leasing Sdn. Bhd. v. Pang Kim Cha & Bros. Development Sdn. Bhd.* [1989] 2 MLJ 61).

For the reasons adumbrated above, I dismissed the appellants' appeal with costs.

Appeal dismissed.

PUBLIC PROSECUTOR

v.

BOY BIN ISLAIS

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[CRIMINAL TRIAL NO. T.3 OF 1988]
10 MARCH 1993

DANGEROUS DRUGS: Accused seen flinging the bag containing cannabis - Chemist report not challenged - Presumption not rebutted.

EVIDENCE: Age of Accused - Statement by Accused as to his age - Is the statement admissible - Is the statement proof of the age of the Accused - Who carries the burden of proving the age of Accused.

A police party spotted three persons which included the Accused, walking in single file and with the Accused foremost carrying a bag on the path towards their direction. As Accused walked past the police party, he was held around the waist from behind. The Accused was seen flinging the bag he was carrying backwards. The other two persons fled. The bag was retrieved and found to contain dried vegetable matter which was later sent to the chemist for analysis. The chemist on analysis found the dried vegetable matter to be cannabis. The chemist report was not challenged by the defence.

The Accused maintained that he was not yet 18 at the time of the commission of the offence whereas the prosecution maintained that he was 21 at the relevant time.

Held:

[1] It is for the defence to challenge the evidence of the chemist as reduced into writing in the chemist report and the evidence was not and in fact could not in view of the absence of the chemist be challenged. Therefore, at that stage, the evidence of the chemist as contained in the chemist report that the dried vegetable matter was cannabis stands unchallenged.

[2] The fact that the Accused flung the bag was indication enough that he was carrying drugs as the Accused wanted to get rid of the incriminating evidence by attempting to dispose of it by flinging it away. The defence did not point to any evidence of the prosecution neither have the defence adduced any